

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR
Criminal Appeal No. 2456 of 1999

Ram Bhajan son of Shiv Prasad Koeer, aged about 37 years, Occupation Agriculture, R/o village Surra, P.S. Balrampur, District Surguja, Madhya Pradesh (Now Chhattisgarh).

---- Appellant

Versus

The State of Madhya Pradesh (Now Chhattisgarh) through Police Station Balrampur, District Surguja.

---Respondent

Criminal Appeal No. 738 of 2004

Jagaram S/o Laldeo Nageshiya, aged 23 years, Occupation-Agriculture, R/o village Surra, Balrampur, Serguja

---- Appellant

Versus

State of Madhya Pradesh (Now Chhattisgarh) through Police Station Balrampur, District Surguja (Ambikapur) (Madhya Pradesh) (Now Chhattisgarh).

---Respondent

For Appellants	:	Ms. Laxmin Tondey, Advocate.
For Respondent/State	:	Shri Ashok Swarnakar, Panel Lawyer.

Hon'ble Shri Navin Sinha, Chief Justice
Hon'ble Shri P. Sam Koshy, J.

Judgment on Board

Per Navin Sinha, Chief Justice

22/12/2015

1. These two appeals arise from the final order of conviction and sentence in Sessions Trial No. 237 of 1997 passed by the 2nd Additional Sessions Judge, Ambikapur dated 2.9.1999 convicting them respectively under Sections 302, 201 IPC, 302/34 and 201 IPC to rigorous life imprisonment on the former charge and three years rigorous imprisonment on the latter charge alongwith fine. In the event of failure to pay the fine, they were required to undergo one year further rigorous imprisonment each.

2. Both the Appellants were granted bail in the appeals on 21.2.2000 and 31.8.2005 respectively. The order sheet in both the appeals reflect that there has been no representation on their behalf on more than one occasion in the past. There was no representation today also when the appeals were taken up. In view of (2014) 14 SCC 222 (Surya Baksh Singh v. State of Uttar Pradesh) keeping in mind the age of the appeals, the bail granted to the Appellants, we do not consider it prudent to adjourn the matter on that ground by issuing warrants of arrest for their representation.

3. With the assistance of Learned State Counsel and Ms. Laxmin Tondey, Panel Lawyer from the High Court Legal Services Committee who appeared at our request, we have gone through the judgment under appeal, the evidence led by the parties and proceed to adjudicate the appeals finally.

4. The Appellant-Jagaram was the brother of the deceased-Birbal. He lodged the FIR (Exhibit P-14) on 6.10.1996 registered as Crime No. 81 of 1996 stating that his brother had gone to the house of another the previous day at noon. Today he was informed by another that the dead body of his brother was lying in the field. He had been assaulted with a sharp cutting weapon. The postmortem (Exhibit P-2) was conducted by Dr. S.P.Baish (PW-13) who noticed the following injuries:

"1. Incised wound 7"X4" and 1½" deep on the left side of the neck extended towards occipital region of head.

2. Incised wound 6"X1½"" and 1½" deep on the right side of neck extending obliquely to occipital portion of skull.

3. Incised wound 4"X1½" back of neck and 1" deep.

4. Abrasion on left gluteal region 4"X1½".

5. Multiple contusion with abrasions on left thigh.

6. Skull bone incised and prolapsed as brain material seen externally through wounds in injury No. 1 and 2."

Death was opined due to haemorrhage and shock as a result of injuries to the brain and vital arteries by sharp and hard object, homicidal in nature. The time elapsed since death was estimated as 24-36 hours.

5. The Appellant-Jagaram is stated to have made a confession (Exhibit P-6) leading to recovery of the alleged weapon of assault which is considered inconsequential in view of absence of any forensic report regarding presence of blood on it even though it had been sent for forensic examination and the report never came. There is no eyewitness to the occurrence and the entire case of the prosecution is based on circumstantial evidence. The Trial Court convicted them on the ground that they were last seen with the deceased in the evening and even if the witnesses had mentioned the presence of the Appellant-Rambhajan only, there were stated to be two other persons and possibility that one of them was Appellant-Jagaram could not be ruled out. The fact that the Appellant-Jagaram knew where the body was lying and stated in the FIR that the deceased had been assaulted with a sharp cutting weapon was evidence that he was fully aware of all facts and circumstances and lodged the FIR deliberately to mislead as he had a motive to kill the deceased because the Appellant-Jagaram had a illicit relation with Sita Devi (PW-7) wife of the deceased.

6. Ms. Laxmin Tondey, Learned Counsel for the Appellants submitted that there is no eyewitness to the assault and the entire case of the prosecution rests on circumstantial evidence invoking the last seen theory. It was for the prosecution to prove all the links in the chain of circumstances leading to the inevitable conclusion and the only hypothesis of the guilt of the Appellants ruling out the possibility of death having taken place in any other manner and that it may have been caused by another. PW-3, PW-4, PW-5, PW-9, PW-10 and PW-15 have all spoken that the deceased was seen the previous evening with the Appellant-Rambhajan. None of them have mentioned the presence of Appellant-Jagaram. The conclusion by the Trial Judge that some of the witnesses had mentioned the presence of two more persons and that one of them may have been the Appellant-Jagaram amounts to subverting the entire system of criminal jurisprudence contrary to the theory of proof beyond reasonable doubt. The onus which rested on the prosecution has wrongly been shifted on the Appellants raising a presumption against them. There

is absolutely no evidence to suggest that the Appellant-Jagaram was with the deceased the previous evening. According to the prosecution case itself, Appellant-Rambhajan was an accomplice and not the assailant. If the prosecution has not been able to establish charge against the Appellant-Jagaram on the basis of circumstantial evidence the question of convicting an accomplice simply does not arise.

7. It was next submitted that there was absolutely no evidence led by the prosecution of any illicit relation between Sita Devi (PW-7) wife of the deceased and the Appellant-Jagaram. The witness had gone hostile denying her police statement including any alleged extra-judicial confession by the Appellant-Jagaram. PW-23, the Investigating Officer stated that he had recorded the police statement of the witness correctly but the witness was not confronted with the same thereafter under Section 145 of the Evidence Act. The conclusion of the Trial Judge that because the Appellant-Jagaram knew where the body was lying and in the FIR stated the nature of injuries, combining it with the presumption of illicit relationship between PW-7, Sita Devi and the Appellant-Jagaram, the Trial Judge has based the conviction on conjectures and surmises to conclude that PW-7 was attempting to save the Appellant-Jagaram without any basis for the same. The fact that there may have been any confession leading to recovery of the weapon of assault is completely inconsequential in absence of any forensic report with regard to presence of blood on the same.

8. Learned Counsel for the State submitted that the motive for assault existed with Appellant-Jagaram as PW-7, Sita Devi, wife of the deceased in her police statement had spoken of her illicit relationship between her and the Appellant much to the dislike of the deceased. The witness had spoken of the presence of co-accused Rambhajan with the deceased the previous evening. Even if there was no specific mention of Appellant-Jagaram, if motive existed and the Appellant-Rambhajan was an accomplice, the possibility of one of the unidentified persons being the Appellant-Jagaram as discussed by the Trial Court cannot be said to be

wishful thinking but may be based on preponderance of probabilities also. If the deceased who was the brother of Appellant-Jagaram went out the previous afternoon and did not come home at night, the conduct of the Appellant-Jagaram in the background of the motive in not making any efforts to trace his brother till 10:00 am next morning, certainly creates suspicion with regard to his conduct.

9. We have considered the submissions on behalf of the parties and perused the evidence on record.

10. There is no eyewitness account and the case of the prosecution rests on circumstantial evidence invoking the last seen theory. This theory is invoked in support of the contention that if the deceased and the accused were last seen together and there were no intervening factors to show presence of any other or their parting of their ways, the law presumes a situation where the onus shifts on the accused to demonstrate that he was not involved in the occurrence and that he had either parted ways or the deceased was in company of the others or may have died under any other circumstances.

11. We regret our inability to concur with the Trial Judge that motive existed for the Appellant-Jagaram to kill the deceased as he had an illicit relation with the latter's wife PW-7. On the contrary, the witness has gone hostile and denied her police statement specifically. A bald question was asked to the Investigating Officer (PW-23) who confirmed that he had recorded her statement correctly but no specific question was put to PW-23 with regard to that part of the statement where she had gone hostile on the issue of motive let alone confronted her with the statement of PW-23. The alleged confession and recovery of the weapon of assault is considered irrelevant in the background of the fact that there is no FSL report with regard to the same more so when it was sent for the forensic examination and no explanation is coming from the prosecution why the report was not obtained.

12. It is very difficult to concur with the conclusion of the Trial Judge that one of the other two persons seen at the time when the Appellant-Rambhajan was with

the deceased the previous evening may have been Appellant-Jagaram. To accept that reasoning would be changing the entire criminal jurisprudence by shifting the initial burden on to the accused himself when it is the duty of the prosecution to first prove the charge. A criminal trial cannot be decided on basis of conjectures and surmises. We are equally unable to agree with the conclusion that in the background of the alleged motive of illicit relationship merely because the Appellant-Jagaram had lodged the FIR mentioning the place where the body was lying or the nature of injuries on the person was evidence that he was aware of the entire facts and circumstances of the death. It completely ignores the statement in the FIR by the Appellant-Jagaram that he had been informed by Ku. Bini daughter of Subedar Nageshiya that the dead body of his brother was lying in the fields. It was the duty of the prosecution to lead the evidence of Ku. Bini but no explanation has been given why it was not done.

13. If the charge under Section 302/34 IPC does not stand against the Appellants, the question of their conviction in the facts of the case under Section 201 IPC, the body having been found in the village field becomes unsustainable.

14. We are therefore of the considered opinion that the prosecution has failed to prove that the deceased was last seen with the Appellants and to hold them guilty by invoking Section 106 of the Evidence Act and shifting the burden to them without the prosecution having discharged the initial burden of proof.

15. The conviction of the Appellants is therefore held to be unsustainable and is set aside, subject to the conditions enumerated under Section 437A CrPC.

16. The appeals are allowed.

Sd/-
(Navin Sinha)
CHIEF JUSTICE

Sd/-
(P. Sam Koshy)
JUDGE